STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMITRAY LASHONE HODGE,

Defendant-Appellant.

UNPUBLISHED
July 14, 2009

No. 279405
Genesee Circuit Court
LC No. 06-018532-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHERMAN MARTINEZ BUGGS,

Defendant-Appellant.

No. 279550
Genesee Circuit Court
LC No. 06-018533-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY O'KEITH WALKER,

Defendant-Appellant.

No. 279715
Genesee Circuit Court
LC No. 06-018545-FC

Before: Murphy, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

Defendant, Demitray Hodge, was convicted, following a jury trial, of three counts of first-degree premeditated murder, MCL 750.316[1]; three counts of first-degree felony murder, MCL 750.316; one count of conspiracy to commit first-degree murder, MCL 750.157a; MCL 750.316; three counts of armed robbery, MCL 750.529; two counts of conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529; two counts of first-degree home invasion, MCL 750.110a(2); two counts of conspiracy to commit first-degree home invasion, MCL 750.157a; MCL 750.110a(2); one count of carjacking, MCL 750.529a; one count of conspiracy to commit carjacking, MCL 750.157a; MCL 750.529a; one count of arson of a dwelling house, MCL 750.72; one count of conspiracy to commit arson of a dwelling house, MCL 750.157a; MCL 750.72; one count of carrying a concealed weapon, MCL 750.227; one count of felon in possession of firearms, MCL 750.224f; and one count of felony-firearm, MCL 750.227b. The trial court found defendant to be a habitual offender first offense, MCL 769.10. He was sentenced to life without parole for each of the three counts of first-degree premeditated murder, life without parole for the three counts of first-degree felony murder, life without parole for the one count of conspiracy to commit first-degree murder, thirty-five to seventy years for the three counts of armed robbery, thirty-five to seventy years for the two counts of conspiracy to commit armed robbery, twenty to thirty years for the two counts of first-degree home invasion, twenty to thirty years for the two counts of conspiracy to commit first-degree home invasion, twenty to forty years for the one count of carjacking, twenty to forty years for the one count of conspiracy to commit carjacking, fifteen to thirty years for the one count of arson of a dwelling house, fifteen to thirty years for the once count of conspiracy to commit arson of a dwelling house, three years to seven years and six months for the one count of carrying a concealed weapon, three years to seven years and six months for the one count of felon in possession of firearms, and two years for the one count of felony-firearm. Defendant appeals and we affirm, but vacate defendant's excessive murder convictions.

Defendant, Jerry Walker, was convicted, following a jury trial, of four counts of second-degree murder, MCL 750.317; two counts of conspiracy to commit first-degree murder, MCL 750.157a; MCL 750.316; one count of first-degree premeditated murder, MCL 750.316; three counts of armed robbery, MCL 750.529; two counts of conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529; two counts of first-degree home invasion, MCL 750.110a(2); two counts of conspiracy to commit first-degree home invasion, MCL 750.157a; MCL 750.110a(2); one count of first-degree felony murder, MCL 750.316; one count of arson of a dwelling house, MCL 750.72; and one count of carrying a concealed weapon, MCL 750.227. He was sentenced to thirty to fifty years for the four counts of second-degree murder, life without parole for the two counts of conspiracy to commit first-degree murder, fifteen to thirty years for the three counts of armed robbery, fifteen to thirty years for the two counts of conspiracy to commit armed robbery, three to twenty years for the two counts of first-degree home invasion, five to twenty years for the two counts of conspiracy to commit home invasion, life without parole for the one count of first-degree premeditated murder, life without parole for the one count of first-degree felony murder, five to twenty years for the one count of arson of a dwelling

[1] As to the murders of Green Wedlow and Catherine Wedlow, the jury returned guilty verdicts for second-degree murder and the judge incorrectly sentenced both based on first-degree premeditated murder.

house, and nine months to five years for the one count of carrying a concealed weapon. Defendant appeals and we affirm, but vacate defendant's excessive murder convictions.

Defendant, Sherman Buggs, was convicted, following a jury trial, of six counts of first-degree murder, MCL 750.316; two counts of conspiracy to commit first-degree murder, MCL 750.157a; MCL 750.316; three counts of armed robbery, MCL 750.529; two counts of conspiracy to commit armed robbery, MCL 750.157a; MCL 750.529; two counts of first-degree home invasion, MCL 750.110a(2); two counts of conspiracy to commit home invasion, MCL 750.157a; MCL 750.110a(2); three counts of carrying a concealed weapon, MCL 750.227; one count of felon in possession of firearms, MCL 750.224f; one count of felony-firearm, MCL 750.227b; one count of carjacking, MCL 750.529a; one count of conspiracy to commit carjacking, MCL 750.157a; MCL 750.529a; and one count of arson of a dwelling house, MCL 750.72. The trial court found defendant to be a habitual offender second offense, MCL 769.10. He was sentenced to life without parole for each of the six counts of first-degree murder, life without parole for the two counts of conspiracy to commit first-degree murder, forty-five to eighty years for the three counts of armed robbery, forty-five to eighty years for the two counts of conspiracy to commit armed robbery, twenty to forty years for the two counts of first-degree home invasion, twenty to forty years for the two counts of conspiracy to commit home invasion, three to ten years for the three counts of carrying a concealed weapon, three to ten years for the one count of felon in possession of firearms, two years for the one count of felony-firearm, forty to sixty years for the one count of carjacking, forty to sixty years for the one count of conspiracy to commit carjacking, and twenty to forty years for the one count of arson of a dwelling house. Defendant appeals and we affirm, but vacate defendant's excessive murder convictions.

The codefendants were tried together with separate juries. The trial court joined for trial crimes that occurred at Green and Catherine Wedlow's home and crimes that occurred at Robert Vondrasek's home.

The facts presented at trial established that on January 27, 2006, Catherine Wedlow and her husband, Green Wedlow, were found shot to death in their home. The front door had been forced open, and various items were taken from the home. Testimony revealed that the codefendants planned to rob the Wedlows, that Buggs shot Mrs. Wedlow, and that Hodge shot Mr. Wedlow. Further, on January 30, 2006, Robert Vondrasek was found dead in his home, which had been set on fire. His body was severely burned and his throat was cut. Testimony also revealed that the codefendants planned to rob Vondrasek's home and steal his car, the robbery went badly, and they ended up stabbing him.

I. Defendant Hodge's issues

Hodge first argues that his convictions for the Wedlow murders be reversed and his case remanded for a new trial because the jury's verdict was against the great weight of the evidence. We disagree. This Court denied Hodge's motion to remand, but the Court can review Hodge's claim for plain error affecting his substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003). To avoid forfeiture of an unpreserved, non-constitutional plain error, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear and obvious, 3) and the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A new trial can be granted "only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). In addition, the trial court judge may not act as "thirteenth juror" in ruling on motions for a new trial. *Id.* Finally, "new trial motions based solely on the weight of the evidence regarding witness credibility are not favored." *Id.* at 639.

In this case, Hodge argues that certain witnesses lacked credibility because they were jail inmates who made deals with the prosecutor, and the testimony was deprived of all probative value because it was contradicted by the undisputed evidence. However, the jury was made fully aware of the witnesses' backgrounds and the deals that were made. The jury was also aware of any evidence that may have contradicted any testimony. None of the testimony was so far impeached that it was deprived of any probative value. Although some of the evidence contradicted witnesses' testimony, the witnesses' versions of the murders were sufficiently similar to contain some probative value. The jury must weigh the credibility, and the judge must not act as the "thirteenth juror." Thus, there was not plain error affecting Hodge's substantial rights.

Hodge argues secondly that his multiple conspiracy convictions violate double jeopardy because they were based on a single conspiracy. We disagree. This Court reviews challenges under the Double Jeopardy Clauses of the Michigan and United States Constitutions de novo. *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003). Because defendant did not object to being charged with multiple conspiracies, we review his claim under the Double Jeopardy Clause for plain error. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Neal v Wilkes*, 470 Mich 661, 665; 685 NW2d 648 (2004). The best source for determining legislative intent is the specific language of the statute. *Id.* When the Legislature has unambiguously conveyed its intent, the statute speaks for itself and judicial construction is neither necessary nor permitted. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002).

Further, both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15; *People v Ream*, 481 Mich 223, 227; 750 NW2d 536 (2008). The purpose of the Double Jeopardy Clause is to "protect a person from being twice placed in jeopardy for the 'same offense' [and] ... to prevent the state from making repeated attempts at convicting an individual for an alleged crime." *People v Torres*, 452 Mich 43, 63; 549 NW2d 540 (1996).

It is clear from looking at the statute that the Legislature intended to punish separately for each crime conspired. Although generally, a single agreement to commit multiple offenses is found to be one conspiracy because the focus is placed on the agreement and not on the objects of the conspiracy, *Braverman v United States*, 317 US 49, 53; 63 S Ct 99; 87 L Ed 23 (1942), the Michigan statute, MCL 750.157a, differs from the statute analyzed in *Braverman*. The Court in *Braverman* noted that the federal conspiracy statute defined conspiracy as the "agreement or confederation of the conspirators to commit one or more unlawful acts . . . ." *Id.* The actual language of the statute used the terms "any offense." *Gerard v United States*, 61 F2d 872, 873 (CA 7, 1932). The *Braverman* Court held that the precise nature and extent of the conspiracy

must be determined by reference to the agreement that embraces and defines its objects. *Braverman*, *supra* at 53.

By contrast, the Michigan Legislature chose the phrase "an offense" rather than "an offense or offenses" or "any offense." MCL 750.157a provides:

> Any person who conspires together with 1 or more persons to commit an offense prohibited by law, or to commit a legal act in an illegal manner is guilty of the crime of conspiracy punishable as provided herein . . . .

The prosecutor asserts this choice of words indicates the Legislature's intent to punish for each crime conspired. We agree, and the statute must be enforced as written. *City of South Haven v Van Buren Co Bd of Comm'rs*, 478 Mich 518, 525; 734 NW2d 533 (2007). Therefore, a single agreement, the conspiracy, does not "embrace" its criminal objects because of the wording of MCL 750.157a. "Because the statutory elements, not the particular facts of the case, are indicative of legislative intent, the focus must be on these statutory elements." *Ream*, *supra* at 238. The crime of conspiracy in Michigan thus embraces only a single criminal object ("an offense").

Further, the prosecutor also asserts that the punishments for conspiracy are different depending on the crime agreed to, which is indicative of the Legislature's intent to impose separate punishments for each crime conspired. We agree. MCL 750.157a further provides:

> (a) Except as provided in paragraphs (b), (c) and (d) if commission of the offense prohibited by law is punishable by imprisonment for 1 year or more, the person convicted under this section shall be punished by a penalty equal to that which could be imposed if he had been convicted of committing the crime he conspired to commit and in the discretion of the court an additional penalty of a fine of $10,000.00 may be imposed.
>
> (b) Any person convicted of conspiring to violate any provision of this act relative to illegal gambling or wagering or any other acts or ordinances relative to illegal gambling or wagering shall be punished by imprisonment in the state prison for not more than 5 years or by a fine of not more than $10,000.00, or both such fine and imprisonment.
>
> (c) If commission of the offense prohibited by law is punishable by imprisonment for less than 1 year, except as provided in paragraph (b), the person convicted under this section shall be imprisoned for not more than 1 year nor fined more than $1,000.00, or both such fine and imprisonment.
>
> (d) Any person convicted of conspiring to commit a legal act in an illegal manner shall be punished by imprisonment in the state prison for not more than 5 years or by a fine of not more than $10,000.00, or both such fine and imprisonment in the discretion of the court.

Depending on the crime agreed to, the punishment is different. The Legislature has unambiguously conveyed its intent to demarcate separate punishments for each crime conspired, and judicial construction is neither necessary nor permitted. *Koontz*, *supra.* Indeed, any other

construction would potentially create an ambiguity regarding the punishment imposed. For example, suppose a defendant conspires to commit an offense punishable by imprisonment for one year or more, and conspires to commit an offense punishable by imprisonment for less than one year, and he is convicted. Under Hodge's theory, both crimes constitute one conspiracy with one punishment. Thus, the penalty could arguably be different in this scenario even though the crimes would not change: he could be sentenced to serve one year or more in prison, even though one crime had a maximum of below one-year imprisonment; or, on the other hand, he could be sentenced to serve below one-year imprisonment, despite the fact that he conspired to commit a crime with a minimum imprisonment term of one year or more. It is clear that the Legislature did not intend such a result, and that according to MCL 750.157a, it intended to punish separately for each crime conspired.

Finally, if the Legislature had intended for a defendant to be punished once for a conspiracy to commit multiple offenses, they would have added the plural offenses or simply stated, "if a person conspires to commit a number of offenses, he is guilty of only one conspiracy so long as such multiple offenses are the object of the same agreement." Other jurisdictions have created statutes that have such language. See, e.g., Mo Ann Stat 564.016(3); Ariz Rev Stat 13-1003(C). Unlike these statutes and the statute in *Braverman*, MCL 750.157a permits the charging of multiple offenses.

Thus, Hodge's multiple conspiracy convictions did not violate double jeopardy because under MCL 750.157a, he may be convicted of separate counts of conspiracy for each offense. Because it is clear from looking at the statute that the Legislature intended to punish for each crime conspired, judicial construction is prohibited and neither the *Blockburger* test, *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932), nor the "totality of the circumstances" analysis is necessary. See *Calloway, supra* at 450-451. Similarly, it is unnecessary to address this issue in regards to whether there was enough evidence to find separate agreements because of the Legislature's intent to punish for each crime conspired.

Hodge argues that his convictions of felony murder and second-degree murder of a single victim violate double jeopardy. We agree. See *People v Williams II*, 475 Mich 101, 103; 715 NW2d 24 (2006). Similarly, it violates double jeopardy to convict of both first-degree premeditated murder and first-degree felony murder for the same victim. Accordingly, Hodge should be convicted of one count of first-degree murder for each of the three victims. We vacate the excessive murder convictions.

Hodge next argues that once he was convicted of felony murder, the predicate felony must be vacated. We disagree. Recently, the Michigan Supreme Court overruled *People v Wilder*, 411 Mich 328, 342; 308 NW2d 112 (1981), and held that a person may be convicted of both felony murder and the predicate felony. *Ream, supra* at 242.

Hodge finally argues that he was entitled to a separate trial because the trial court erred when it admitted the testimony of a witness called by a codefendant. We disagree. "The use of separate juries is a partial form of severance to be evaluated under" the abuse of discretion standard. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994). "The issue is whether there was prejudice to substantial rights after the dual-jury procedure was employed." *Id.*

Hodge does not cite to any authority for the proposition that he is entitled to a separate trial. Hodge seems to be arguing that because his jury was exposed to a codefendant's witness, it

caused unfair prejudice to Hodge, thus eliminating the protection that having separate juries was designed to protect. We reject the notion that it was prejudicial for Hodge's jury to hear the testimony of the witness because there is no evidence that the witness's testimony was inadmissible at trial. There does not appear to be any reason that if, for example, the prosecutor had called the witness as a witness, her testimony would have been inadmissible. "A fair trial does not include the right to exclude relevant and competent evidence." *Zafiro v United States,* 506 US 534, 540; 113 S Ct 933; 122 L Ed 2d 317 (1993). Therefore, the fact that the trial court allowed Hodge's jury to hear the testimony of codefendant's witness did not demonstrate prejudice to his substantial rights, and his request for a separate trial is denied.

II. Defendant Walker's issues

Walker first argues that the cumulative effect of the trial court's errors of joining both the Wedlow and Vandrosek incidents before one jury, failing to suppress Walker's statement, and allowing evidence of other bad acts denied Walker his right to a fair and impartial trial. We disagree. This issue must be evaluated in three sub-issues: joinder, suppression of statement, and other acts evidence.

Whether defendant's charges are related is a question of law that the court reviews de novo. *People v Tobey,* 401 Mich 141, 153; 257 NW2d 537 (1977). The court's ultimate ruling on a motion to sever is reviewed for an abuse of discretion. *People v Duranseau,* 221 Mich App 204, 208; 561 NW2d 111 (1997).

MCR 6.121(B) provides that on "defendant's motion, the court must sever unrelated offenses for separate trials." Two or more offenses are related offenses if they are based on the same conduct or transaction, a series of connected acts, or a series of acts constituting parts of a single scheme or plan. MCR 6.120(B)(1). The Court in *Tobey* noted:

> The staff comment to MCR 6.120 notes that "[t]he standard in subrule (B) . . . is derived from ABA Standard 13-1.2, and a predecessor standard, ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance (Approved Draft, 1968), Standard 1.1." Standard 13-1.2 defines related offenses as follows: " 'Two or more offenses are related offenses if they are based upon the same conduct, upon a single criminal episode, or upon a common plan.' " *People v McCune,* 125 Mich App 100, 103; 336 NW2d 11 (1983, quoting ABA Standard 13-1.2. Standard 1.1 provides:
>
> "Two or more offenses may be joined in one charge . . . when the offenses . . . :
>
> (a) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (b) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." [*Tobey, supra,* at 150 n 13.]

In this case, the trial court found that the Wedlow and Vondrasek incidents involved a like theory of prosecution and were marked by similar witnesses and defense claims. The court also found that the crimes were connected and part of a common plan or scheme to rob and kill

elderly people. Walker argues the charges were not the same conduct because in one there was a shooting of the victim and in the other there was a stabbing and arson. However, the two incidents did involve the same conduct because both involved homicides, robberies, and home invasion of elderly people. The offenses in each incident were of "the same or similar character." Further, the common goal was to rob and kill elderly people. In both incidents there were elderly victims, homicides, robberies, and home invasions. Each offense was to contribute to the achievement of the common goal to rob and murder elderly people. Because the offenses were related, part of a single scheme or plan, joinder was appropriate and the trial court did not abuse its discretion by denying Walker's motion to sever.

This Court reviews the ultimate decision of a motion to suppress evidence de novo and reviews the trial court's finding of fact for clear error. *People v Galloway*, 259 Mich App 634, 638; 675 NW2d 883 (2003).

The trial court did not clearly err when it held that Walker was not promised by Officer Ellis that Walker would go home if he talked and his waiver was knowing and intelligent.

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack or education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1998).]

This list is not exclusive. *Id.* To determine whether a confession was freely and voluntarily made, the court must look at the totality of circumstances. *Id.* The trial court in this case carefully considered evidentiary hearing testimony, Walker's testimony at the preliminary examination, the videotape of Walker's statement, and the people's exhibit of Walker's prior juvenile matter. After considering this evidence, the court concluded that Walker was not promised by Officer Ellis that he would go home if he talked. The court further concluded that the waiver was knowing and intelligent. In fact, Walker testified that he understood the words that comprised his rights and nothing in the videotape led the court to believe he was confused. Walker has not asserted anything different to lead this Court to conclude that the trial court erred in its findings of fact.

Reviewed de novo and accepting the trial court's findings of fact leads this Court to conclude that the trial court did not err when it denied Walker's motion to suppress his statement to the police. Also, the waiver was knowing and intelligent. We affirm the trial court's decision to deny Walker's motion to suppress.

Walker argues that the trial court erred in its decision to allow the evidence of other acts because any probative value the evidence may have had was substantially outweighed by its unfair prejudice, and its only purpose was to show defendant's bad character. We disagree. A

trial court's decision whether to admit evidence of other acts is reviewed for clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The prosecutor asserted during the motion hearing that the evidence would be used to show a common plan, scheme, or system involving the robbery and killing of elderly people. After finding out that Walker might contend he was merely present at the crime scenes or any alleged wrongdoing occurred through duress, the prosecutor also included intent as an MRE 404(b) purpose. It should be noted that defendant acknowledges that the prosecutor had indicated a purpose that "may have been relevant to some issue at hand." Thus, the purposes, to show a common plan, scheme, or system and intent, are both allowed under MRE 404(b)(1) and therefore are proper non-character purposes.

As to the unfair prejudice argument, the trial court did not abuse its discretion when holding that the evidence would not cause unfair prejudice. MRE 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." The trial court properly held that Walker's presence on multiple crime scenes was probative of the quality of his intent. Further, the trial court properly found support for its conclusion to allow the Wedlow and Vondrasek evidence to prove common plan or scheme. For these reasons, the trial court properly admitted the evidence of other acts.

Finally, "[d]efendant's argument that the cumulative errors deprived him of a fair trial is without merit. Because no errors were found with regard to any of the above issues, a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999) (citations omitted). Therefore, Walker is not entitled to a new trial.

Walker next argues that he should only be convicted of one count of second-degree murder of Mr. Wedlow and one count of second-degree murder of Mrs. Wedlow. We agree. As with defendant Hodge, defendant Walker can only be convicted of one count of murder for each victim. Accordingly, the excessive murder convictions are vacated.

Similarly, Walker's convictions and for both first-degree premeditated murder and felony murder of Vondrasek violate double jeopardy for the same reasons. His judgment of sentence should reflect one conviction and one sentence for first-degree murder with respect to Vondrasek.

Walker next argues that since he was found guilty of felony murder, the predicate felonies should be vacated. We disagree. *Ream*, *supra*.

Walker further argues that his conviction and sentence as to Count 5, conspiracy to commit murder as to the Wedlows, should be vacated. We disagree. It is true, as Walker asserts, that there is no substantive crime of conspiracy to commit second-degree murder. *People v Hammond,* 187 Mich App 105, 109; 466 NW2d 335 (1991). However, Walker was not convicted of conspiracy to commit second-degree murder, he was convicted of conspiracy to commit first-degree murder. Though it seems inconsistent that the jury returned a verdict convicting Walker of second-degree murder and conspiracy to commit first-degree murder as to the Wedlows, such inconsistency is allowed in jury verdicts. *People v Lewis,* 415 Mich 443, 449; 330 NW2d 16 (1982); *People v Vaughn,* 409 Mich App 463, 465; 295 NW2d 354 (1980). In fact, " '[c]onsistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment.' " *Vaughn, supra* quoting *Dunn v United States,* 284 US 390, 393; 52 S Ct 189; 76 L Ed 356 (1932).

Finally, Walker argues that there was no evidence that demonstrated that he either caused or helped cause the death of Vondrasek or conspired to cause his death. Thus, Walker's motion for directed verdict as to such counts should have been granted. We disagree. To determine whether there was sufficient evidence to sustain a conviction, the Court reviews the evidence de novo in a light most favorable to the prosecution. *People v Wolfe*, 440 Mich 508, 513; 489 NW2d 748 (1992). The same standard applies to review of motions for directed verdicts. *Mayhew, supra* at 124.

Walker was found guilty of premeditated murder, felony murder, and conspiracy to commit murder of Vondrasek. The prosecution relied in part on an aiding and abetting theory.

> "Aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime and comprehends all words or deeds that might support encourage, or incite the commission of a crime . . . .
>
> . . . To support a finding that a defendant aided and abetted a crime, the prosecutor must show that (1) the crime charged was committed by the defendant or some other person, (2) the defendant performed acts or gave encouragement that assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time he gave aid and encouragement. An aider and abettor's state of mind may be inferred from all the facts and circumstances. Factors that may be considered include a close association between the defendant and the principal, the defendant's participation in the planning or execution of the crime, and evidence of flight after the crime. [*People v Turner,* 213 Mich App 558, 568-569; 540 NW2d 728 (1995), overruled in part on other grounds *People v Mass,* 464 Mich 615, 627-628; 628 NW2d 540 (2001). Citations omitted.]

Despite Walker's claim, there was evidence submitted at trial that demonstrated his involvement with Vondrasek's death. Most notable is the fact that Vondrasek's blood was found on Walker. The presence of a victim's blood on Walker suggested that he himself assaulted the victim. *Carines, supra* at 758. Walker admitted that he knew his codefendants committed prior home invasions, and he even accompanied them during a different home invasion. He also admitted to being at Vondrasek's home while the crimes were being committed. Viewed in the light most favorable to the prosecution, the evidence was sufficient to sustain conspiracy and murder convictions related to the killing of Vondrasek.

III. Defendant Buggs' issues

First, Buggs argues that the charges should have been severed for trial. For the same reasons as discussed above, we disagree.

Buggs next argues that the trial court abused its discretion by overruling Buggs' objection to the introduction of expert testimony on a handwriting comparison by Frank Marsh. We disagree. This Court reviews a trial court's rulings concerning the qualifications of proposed expert witnesses to testify for an abuse of discretion. *Woodward v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

Buggs' objection at trial pertained solely to Marsh's qualifications as a handwriting expert and did not object to the admissibility of graphology. Issues must be preserved with specificity. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Therefore, the issue pertaining to Marsh's qualifications as a handwriting expert was preserved. As to the evidence pertaining to graphology, to avoid forfeiture of an unpreserved, non-constitutional plain error, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, and 3) the plain error affected substantial rights. *Carines, supra* at 763.

MRE 702 provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise . . . .

MRE 104 requires trial courts to determine preliminary questions concerning the qualification of a person to be a witness. Based on the language of MRE 702 and MRE 104, "trial courts have an obligation to exercise their discretion as a gatekeeper and ensure that any expert testimony admitted at trial is reliable." *People v Yost*, 278 Mich App 341, 394; 749 NW2d 753 (2008), citing *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004).

Marsh testified that in his opinion, Buggs wrote the note left at Vondrasek's home. Buggs objected to this testimony on the basis that Marsh was not qualified as an expert, but the trial court admitted it based on Marsh's education and experience. Although Marsh testified that he had not had any standardized training in document comparison, he did have extensive experience in the field. Under MRE 702, a witness can qualify as an expert through "knowledge, skill, experience, training, or education." Marsh had the knowledge, experience, and base education in document comparison. See Yost, *supra* at 394. Therefore, the trial court did not abuse its discretion by allowing his testimony.

Further, Buggs argues that the graphology evidence presented by Marsh was unfairly prejudicial. We disagree. In summary, Marsh testified that the way a "y" was written in the note was an indicator of possible violence or thinking of violence. Testimony stating that the author of the note was an indicator of possible violence or thinking of violence was hardly a revelation to the jury. It seems clear that by the author of the note calling himself "the .22 caliber killer,"

he has some violence on his mind. Marsh simply stated the obvious, and thus the court did not commit plain error affecting substantial rights in allowing the testimony.

Buggs next argues that he was denied effective assistance of counsel because his trial attorney did not object to the admission of hearsay testimony by witnesses Bonds and Sealey. We disagree. This Court reviews a defendant's claim that he was denied the effective assistance of counsel as a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *Id.*

To support a claim of ineffective assistance of counsel, the defendant must show that counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that counsel's representation prejudiced defendant to the degree that he was denied a fair trial. *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997). Counsel must have made errors so serious that counsel was not functioning as counsel guaranteed by the Sixth Amendment. *Id.* at 164-165, citing *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Also, counsel's "ineffective assistance must be found to have been prejudicial in order to reverse an otherwise valid conviction." *Id.* at 314. The United States Supreme Court held:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. [*Strickland v Washington*, 466 US 668, 689-690; 104 S Ct 2052; 80 L Ed 2d 674 (1984).]

The admission of a declarant's statement to another is allowed when the statement subjects the declarant to civil or criminal liability. MRE 804(b)(3). Buggs argues that the statements did not subject the declarant, Walker, to civil or criminal liability.

Whether to admit or exclude a statement against penal interest is determined by considering four factors. *People v Ortiz-Kehoe*, 237 Mich App 508, 517-518; 603 NW2d 802 (1999). The four factors are:

> (1) whether the declarant was unavailable, (2) whether the statement was against penal interest, (3) whether a reasonable person in the declarant's position would have believed the statement to be true, and (4) whether corroborating circumstances clearly indicated the trustworthiness of the statement. [*Id.*]

Regarding the statement that Walker made to Sealey, Buggs only argues that the second factor, whether the statement was against penal interest, has not been met. MRE 804(b)(3) requires that a reasonable person in the declarant's position must have realized that the statement could implicate the declarant in a crime. *People v Barrera,* 451 Mich 261, 271; 547 NW2d 280 (1996). In summary, Walker told Sealey that Buggs shot some old people, that Walker said he was not at the crime scene, that he "ran or whatever," and that Sealey should keep Walker's name out of it. The declarant is Walker, not Sealey.

The declarant must face a reasonable threat of punishment, otherwise the justification for the exception would not exist. *Barrera, supra* at 272. Additionally, there must be a statement that shows the declarant's culpability to some degree, not just the accused's culpability. *Id.* There is nothing in Walker's statements that show that Walker was culpable, or that he seemed to face a "reasonable threat of punishment." Thus, Walker's statement to Sealey was not against his penal interest and therefore not admissible hearsay.

In regards to Walker's statement to Bonds, Walker told Bonds that Buggs kicked in the door and shot Mrs. Wedlow and Hodge shot Mr. Wedlow. Walker also said that he was with Buggs and Hodge at both the Wedlow incident and the Vondrasek incident. Buggs again challenges whether such statements were against Walker's penal interest. Since Walker admitted to being at the scene of both crimes, it seems clear that Walker subjected himself to some criminal liability as a reasonable person in his shoes would conclude. Thus, Walker's statements to Bonds were admissible.

Buggs fails to show that there was a reasonable probability that counsel's representation prejudiced defendant to the degree that he was denied a fair trial. Even if we found that the statements were inadmissible and counsel should have objected, there was enough other evidence to prove Buggs' guilt beyond a reasonable doubt. Therefore, the statements from Bonds and Sealey did not deny Buggs a fair trial.

Buggs finally argues that the sentencing court erred after it properly granted his motion to amend judgment of sentence to reflect three counts of murder, but then the judgment of sentence reflected six counts. We agree. As addressed in Hodge's and Walker's appeals, Buggs should not be convicted of both premeditated murder and first-degree felony murder of one victim. Once a defendant is found guilty of both premeditated murder and felony murder, he or she is convicted for one count and one sentence of first-degree murder supported by two theories: premeditated murder and felony murder. *Williams II, supra* at 103. Accordingly, Buggs should be convicted of one count of first-degree murder for each victim, Mrs. Wedlow, Mr. Wedlow, and Vondrasek, respectively, not for six counts.

Because of the resolution of the above issues, we need not address the People's issue on cross appeal.

The excessive murder convictions and sentences for each of the defendants are vacated, and the matters are remanded to the trial court for corrected judgments of sentence. In all other respects, defendants' convictions and sentences are affirmed. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer